



Australian Copyright Council - Submission on the Broadcasting Service Exclusion Determination Consultation Paper

August 2022

The Australian Copyright Council (the ACC) is grateful for the opportunity to make a submission on the Department of Infrastructure Transport, Regional Development, Communications and the Arts' (the Department) [Broadcasting Service Exclusion Determination Consultation Paper](#) (the [Consultation Paper](#)).

About the Australian Copyright Council

1. The ACC is a small, independent, not-for-profit, non-government organisation dedicated to promoting understanding of copyright law and its application. Representing the peak bodies for professional artists and content creators working in Australia's creative industries and, Australia's major copyright collecting societies, we work to foster collaboration between content creators and consumers.
2. The ACC is a unique organisation:
 - it is the only dedicated copyright expert organisation in Australia
 - its focus is on copyright as it applies to all art forms
 - it provides advocacy, advice and information on copyright issues
 - it is a membership-based organisation, representing over a million creators.
3. The ACC has [26 affiliate member organisations](#)¹ representing over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers, producers, publishers, record labels and architects working in the Australian creative industries. We are aware that several ACC affiliates are also making submissions to the Consultation Paper.
4. As part of its services, the ACC provides [information, education, training](#) and free, [written legal advice](#) to those who fall within its guidelines including the staff of libraries, galleries, museums and educational institutions.²

Background

5. The definition of 'broadcast' under the *Copyright Act 1968* (Cth) (Copyright Act) provides:

¹ See Appendix 1 of this submission.

² See Appendix 2 of this submission.

"broadcast" means a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* .

6. So, any change to the definition of 'broadcast service' in the *Broadcast Services Act 1992* (Cth) (BSA), will have a knock-on effect on Australia's copyright legislative framework and the systems and commercial arrangements in place for the remuneration of creators and other copyright owners.
7. The ACC understands that it is proposed that a new instrument be made in the same terms as the current Determination for a period of up to 10 years.³
8. The ACC made a submission in response to Consultation Paper on the Review of the Alston Determination (the Alston Determination) on 9 August 2019. This submission restates the ACC's 2019 position and provides general comment.

Question 1: Should government make an instrument under subsection 6(2) of the BSA in effectively the same terms as the Broadcasting Services ("Broadcasting Service" Definition—Exclusion) Determination 2019, which excludes services that provide live-streamed content online from being considered a 'broadcasting service'?

9. The ACC supports the proposal that the government makes an instrument under s 6(2) of the BSA in the same terms as the *Broadcasting Services ("Broadcasting Service" Definition—Exclusion) Determination 2019* (2019 Determination), excluding services that provide live-streamed content online from being considered a 'broadcasting service'.
10. As outlined in our 2019 submission, the historical delineation between broadcasting services and internet services, provides the ability to control the exploitation of creative content on these distinct services, allowing for the development of a network of licensing and other commercial arrangements, including the licences.
11. We draw the Department's attention to the judicial interpretation of the Alston Determination in the 2013 decision of the Full Court of the Federal Court in *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited*⁴ where it was made clear that, in the context of radio broadcasting:

...the delivery of the radio program by transmission from a terrestrial transmitter is a different broadcasting service from the delivery of the same radio program using the internet.⁵
12. That is, broadcasting and communication via the internet are different. As a corollary, licensing arrangements and remuneration for use of copyright material in each of these uses is necessarily different too.
13. The remaking of the 2019 Determination will ensure that existing contractual

³ Consultation Paper p 13.

⁴ [2013] FCAFC 11. This case was on appeal from *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited* [2012] FCA 93.

⁵ at paragraph [69]. Commercial Radio Australia sought special leave to appeal based on paragraphs [68]-[69] but was dismissed for 'insufficient prospects of success': see *Commercial Radio Australia Ltd v Phonographic Performance Company of Australia* [2013] HCATrans 187.

arrangements including those that remunerate creators and other copyright owners, remain on foot.

14. The ACC has had the opportunity of seeing the PPCA's draft submission to this Consultation and supports its position in relation to this issue.

Question 2: If the instrument is made, in an effort to provide certainty and stability to industry while broader regulatory reforms are developed and progressed, should it be remade for a duration of 3 years, 5 years, or alternative period of time?

15. The ACC supports the making of a new determination which replicates the existing instrument for a period of at least five years, pending industry wide consultation (in the context of wider media regulation reform) and to allow for the review of existing licensing and other contractual arrangements made in reliance on the existing Determination.
16. Removing the regulatory certainty will disrupt these stable arrangements for the proper remuneration of creators, that have evolved in the sector.
17. The ACC supports the PPCA's draft submission position in relation on this issue.

Question 3: If the instrument is made for a duration of 3 to 5 years, what would be the regulatory and financial impact on your business?

18. As creators and other copyright owners and users have developed licensing arrangements based on the 2019 Determination's existence, continuing the Determination should have little impact.
19. In contrast, the *removal* of the instrument is would cause increased regulatory burdens and compliance costs for some sectors.

Question 4: If the Determination expires on 18 September 2022, with no interim solution in place, how would this impact your business or area of industry? What regulatory and financial costs do you estimate your business would incur in this scenario?

20. The expiration of Determination without an interim solution in place, would result in a practical fusion of the broadcasting right and the 'communication right'⁶ as outlined in the Copyright Act, resulting in the loss the ability to derive (and control) distinct streams of income for creators and other copyright owners.
21. A departure of the existing separation of rights may also be a contravention of Australia's obligations under 'international treaties, multilateral and bilateral trade agreements'⁷ For example, the WIPO Treaty on the Protection of Broadcasting Organizations document⁸

⁶ See Copyright Act s 10 definition.

⁷ Consultation Paper p12.

⁸ [SCCR/37/8: Revised Consolidated Text on Definitions, Object of Protection, Rights to be Granted and Other Issues published 6 December 2018.](#)

outlines that:

“broadcasting” means the transmission either by wire or wireless means for reception by the public of a programme-carrying signal; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent. *Transmissions over computer networks shall not constitute “broadcasting”.* (emphasis added).

This is an articulation of Australia’s current position under the current Determination.

22. The ACC has had the opportunity of seeing the ANZSA’s draft submission to this Consultation and supports its position in relation to this issue.

Question 5: What are your views on the alternatives to remaking the Determination?

23. The ACC cannot foresee any alternatives which could be developed within the short time frame ahead of the current Determination’s expiry on 18 September 2022, which would not cause widespread disruption in the copyright industries.
24. Any alternatives to the remaking of the Determination, must safeguard the interests of creators and other copyright owners to ensure that existing avenues of remuneration under the Copyright Act are not undermined.

Summary and Conclusion

25. The ACC supports the remaking of the Determination for a period of at least 5 years pending industry wide stakeholder consultation allowing for review of existing commercial arrangements made in reliance on the existing Determination, in the context of the Government’s broader work to modernise media regulation.
26. The ACC is thankful to the Department for considering these comments. If the Department has any further queries or requires further information, please let us know.

Eileen Camilleri
Chief Executive Officer
Australian Copyright Council

8 September 2022

Appendix 1

Australian Copyright Council Affiliates

as at 8 September 2022

The Australian Copyright Council's views on issues of policy and law are independent, however we seek comment from the organisations affiliated to the ACC when developing policy positions and making submissions to government. As at the date of this response, the Australian Copyright Council affiliates are:

1. [Aboriginal Artists Agency Ltd](#)
2. [APRA|AMCOS](#)
3. [Ausdance National](#)
4. [Australia New Zealand Screen Association](#)
5. [Australasian Music Publishers Association Ltd](#)
6. [Australian Cinematographers Society](#)
7. [Australian Guild of Screen Composers](#)
8. [Australian Institute of Architects](#)
9. [Australian Music Centre](#)
10. [Australian Publishers Association](#)
11. [Australian Recording Industry Association](#)
12. [Australian Screen Directors Authorship Collecting Society Limited](#)
13. [Australian Society of Authors](#)
14. [Australian Writers Guild Authorship Collecting Society \(AWGACS\)](#)
15. [Big Studio Movie Licence](#)
16. [Copyright Agency](#)
17. [Design Institute of Australia](#)
18. [Illustrators Australia](#)
19. [Image Makers Association Australia](#)
20. [Media Entertainment & Arts Alliance](#)
21. [Musicians Union of Australia](#)
22. [National Association for the Visual Arts](#)
23. [National Tertiary Education Union](#)
24. [Phonographic Performance Company of Australia](#)
25. [Screen Producers Australia](#)
26. [Screenrights](#)

Appendix 2

ACC Guidelines

A core part of the Australian Copyright Council's (ACC) activities is our free written legal advice service. This unique service is targeted primarily to those working in the creative industries and members of our affiliate organisations. Staff members of the organisations listed below are also eligible:

- educational institutions
- arts and cultural organisations
- libraries
- museums
- galleries
- archives.